United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

76-1031

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March 29, 1976

Presiding Justice
United States Court of Appeals
for the Second Circuit
U. S. Federal Court House
Foley Square, New York 10007

Re: U. S. A.
vs.
Charles Bradley Jr.
76-1031

Dear Sir:

Pursuant to an Order of this Court dated March 23, 1976, the appellant wishes the Court to consider the following point as part of his brief on appeal.

DID THE TRIAL COURT ERR IN RULING THAT THE PROSECUTOR WOULD BE ALLOWED TO CROSS EXAMINE THE DEFENDANT, IF HE TESTIFIED IN HIS OWN BEHALF, CONCERNING HIS SIX AND A HALF YEAR OLD CONVICTION FOR ATTEMPTED PETTY LARCENY

At trial, the appellant had considered, on the advise of counsel, of testifying in his own behalf. Counsel requested the trial judge to decide whether he would permit the U. S. attorney, during cross examination, to go into appellant's previous conviction of attempted petty larceny. Judge Carter ruled that the U. S. Attorney could, since it goes into the area of honesty

permitted under 609(a)(2) of the Federal Rules of Evidence (T* 95-8). As a result of that ruling, the defendant did not testify nor put any evidence forth in his behalf. The central issue is, does a six and a half year old conviction for attempted petty larcency, a class B misdemeanor under New York Law fall within the purview of 609(a(2) dealing with dishonesty.

The particular point seems to have not yet been decided in this circuit. The 3rd circuit recently ruled in the case of The Government of the Virgin Islands vs. Toto 18 Crl 2483(3/10/76 edition) that petty larcency does not fall within that category of crimes dealing with "dishonesty or false statement" in 609(a)(2). In that case the defendant was on trial charged with distribution of marihuana. The prosecutor, during cross examination of the defendant, introduced evidence that he had been convicted of the crime of petty larcency. The Court, in reversing for a new trial held that it was not within the intention of Congress to include petty larcency in the category of crimes dealing with "crimen falsi". Crimes which fall within that category are - subornation of perjury, false statement, criminal fraud, embezzelment, false pretense or any other offense the commission of which involves

* T- denotes pages in original trial transcript

some element of deceitfulness, untruthfulness or falsification bearing on the accused's propensity to testify truthfully.

In the new edition of American Jurisprudence (2nd edition- Federal Rules of Evidence 1975 Pages 64-6), the point is made quite clear that the test of dishonesty or false statement includes perjury or false statement- offenses in the nature of crimen falsi, and certainly not minor crimes such as petty larceny except if it were on false pretenses, which was not the case of the situation in issue. Other Courts have held that dishonesty or false statements include only those crimes of moral turpitude U.S vs. Glovia 494 F 2nd (CA 5 Tex. 1974), U.S. vs. Williams 445 F 2nd 421 (CA 10, 1971) cert. den. 404 U.S. 966, citing Supreme Court Rule 609, 51 FRD 315, 391.

In this circuit, the landmark case of U.S. vs. Puco 453F 2nd 539(1971, CA 2) decided before the new rules became effective, held that where a prior conviction negates credibility only so slightly and creates a substantial chance of unfair prejudice, with no probative value, a past con-

viction cannot be used to impeach a defendant who testifies in his own behalf.

The appellant contends that the trial court erred in its ruling. As a result of that ruling, the defendant did not testify in his own behalf with the result being a conviction. In order that the ends of justice be truly served, it it urged that the instant case be reversed, with whatever other relief this Court may deem just and proper.

Respectfully submitted,

Martin Siegel

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Attorney for the appellant